Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-845

ALBERTA S. GILINSKY,

Petitioner,

v.

COLUMBIA UNIVERSITY in the City of New York; WILLIAM J. McGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Decision and Order of the Commissioner of the State Division of Human Rights of the State of New York (the "Commissioner") and the Order and Decision of the Human Rights Appeal Board ("Appeal Board") are not officially reported. The decision of the Appellate Division of the Supreme Court of the State of New York, First Department, without opinion, is reported at 48 A.D. 2d 1012 (1975). The opinion of the Court of Appeals of the State of New York is officially reported at 39 N.Y.2d 612 (1976), and unofficially reported at 385 N.Y.S.2d 19 and

350 N.E.2d 396. The motion for rehearing in the Court of Appeals was denied without opinion and is not reported.

Jurisdiction

Petitioner asserts jurisdiction of this Court arises under 28 U.S.C. § 1257(3).

Question Presented

Whether the Court of Appeals correctly held that the Appeal Board exceeded its statutory authority in setting aside a determination of the Commissioner based upon substantial evidence that respondents did not discriminate against the petitioner on the basis of her sex.

Statutes Involved

Generally, the New York Executive Law §§ 290, *et seq.* ("Human Rights Law") (*McKinney* 1972, *McKinney* Supp. 1976-77), and specifically § 297-a(7)(d) which provides:

"§ 297-a State human rights appeal board

"7. The board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is: * * *

d. supported by substantial evidence on the whole record * * *."

Statement of the Case

Petitioner Gilinsky, upon her own initiative and not in response to any advertisement of Columbia University or other information that a position was available, by letter dated February 28, 1972 to Dr. McGill, President of Columbia, applied for a tenured appointment in Columbia's Department of Psychology (649).* Her application was rejected because there was no vacancy for a tenured appointment in her area of specialization—that of "sensation and perception" (651).

The instant proceeding was commenced by the filing by petitioner of a complaint with the New York State Division of Human Rights ("State Division"). The complaint charged respondents with a discriminatory employment practice "by refusing to appoint me to the faculty [of Columbia] as a visiting professor and then a full tenured professor" by reason of the fact that petitioner is a female (20a).

After full evidentiary hearings at which petitioner was represented by counsel, Commissioner Sable of the State Division held "I find that the Respondents did not discriminate against Complainant because of her sex." (19a) This Decision was based on findings of fact which were supported by substantial evidence (17a-19a). The Decision and Order of the Commissioner was appealed by petitioner to the Appeal Board which by a three to one vote, reversed —purportedly on the ground that the Decision was not supported by substantial evidence.

The Appellate Division, First Department, confirmed the Order and Decision of the Appeal Board. Thereafter, the Appellate Division, First Department, granted Columbia's

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* References are to page numbers in the Appendix of respondents submitted to the Court of Appeals.

motion for leave to appeal. The Court of Appeals then unanimously reversed the Appellate Division and annulled the determination of the Appeal Board, thus reinstating the Commissioner's Decision and Order dismissing petitioner's complaint. The opinion of Judge Gabrielli was rightly limited to determining that the Appeal Board had exceeded its statutory authority in setting aside the Commissioner's determination since his Decision and Order was supported by substantial evidence on the record as a whole.

ARGUMENT

POINT I

There Is No Federal Question Present in This Case.

It is fundamental that for this Court to have jurisdiction under 28 U.S.C. § 1257(3) a substantial federal question must have been properly raised in the state court proceedings. Of course, not every allegation of a federal question suffices to afford jurisdiction. There must be a real substantive question on which the case may turn, not merely a formal one; nor may it be so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311 (1902). A purported federal issue not meeting these standards is insubstantial and properly results in a denial of the petition for a writ of certiorari. *Zucht* v. *King,* 260 U.S. 174, 177 (1922). See also *Palmer Oil Corp.* v. *Amerada Petroleum Corp.,* 343 U.S. 390 (1952).

The only material issue in this case quite clearly does not present such a substantial federal question. Ever since the Commissioner's holding "that the Respondents did not discriminate against Complainant because of her sex . . ." there has only been one fundamental issue in this case—whether his Order dismissing the complaint was supported

by substantial evidence on the record as a whole. The questions of whether the Appeal Board had the statutory authority to set aside the Decision and Order of the Commissioner and of the propriety of purported evidence relied on by the Appeal Board are, of course, but corollaries of this major question.

Petitioner's sole contention to the Appeal Board was that the Decision and Order of the Commissioner was not based on substantial evidence, and it was this argument which she primarily pressed in the Appellate Division and the Court of Appeals. That this issue, and this issue alone, was the only one joined in this case is clear from the first paragraph of the opinion of the Court of Appeals:

> "On this Appeal, we must determine whether the State Human Rights Appeal Board exceeded its statutory authority in setting aside a determination of the Commissioner of the State Division of Human Rights that appellants did not discriminate against the complainant on the basis of her sex. In passing upon this question, we must, perforce, decide whether the decision of the Commissioner is supported by substantial evidence." 39 N.Y. 2d 612, 615

It is thus patently obvious that no federal question exists here. Petitioner's constitutional claims are at best frivolous attempts by her to gain one more opportunity at review.* The only issue this case raises is one of a determination of whether the Commissioner's holding that

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* If there were a federal question within the context of this case, it would deal with the constitutionality of the statutory framework regarding the procedure in the State Division and the review of decisions thereof. However, such a contention is not made by petitioner; in any case such an attempt would be fruitless given the similarity between the New York procedure and the constitutionally sound Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

petitioner had not been discriminated against by Columbia on account of her sex was supported by substantial evidence on the record as a whole. The Court of Appeals, as the highest court of the State of New York, interpreting a New York statute and standards of review thereunder, found that the evidence presented at the hearing "amply" demonstrated that the Commissioner's findings were founded upon substantial evidence, and that, thus, the Appeal Board acted improperly and in excess of its authority under the State Human Rights Law in substituting its view of the weight of the evidence.

POINT II

The Purported Constitutional Questions Raised by Petitioner Are Frivolous.

Petitioner now attempts to raise four alleged constitutional infirmities in the decision of the Court of Appeals. Each is fatally defective on its face.

First, petitioner claims that she was denied due process when the Court of Appeals held that the findings of the Commissioner were supported by substantial evidence. This factual determination by the Court of Appeals certainly raises no specific constitutional issues and cannot be the subject of review by this Court. The procedure of the hearing at the State Division and the review allowed by the statute (N.Y. Executive Law §§ 290, *et seq.*) have not been constitutionally attacked, only the decisions themselves. Such an attempt to transform mere factual determinations into a due process question rising to a substantial constitutional issue must thus clearly fail.

Second, petitioner's claim that she was entitled to procedural due process by Columbia—in addition to the due

process hearing concededly afforded her by the Commissioner—likewise must fail. Respondents are not subject to the due process requirements of the Federal Constitution because Columbia is a private institution not subject to the Fourteenth Amendment standards. *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2d Cir. 1973); see also *Powe* v. *Miles,* 407 F.2d 73 (2d Cir. 1968) (liberal arts college).

Third, petitioner misrepresents the holding of the Court of Appeals which did not hold that Columbia was exempt from the Human Rights Law but merely that courts should exercise great "caution and restraint in such sensitive areas as faculty appointment, promotion and tenure, especially in institutions of higher learning" (Gilinsky petition, Appendix A at 5a), in full accord with numerous federal decisions to the same effect. *See, e.g., Faro* v. *New York University,* 502 F.2d 1229 (2d Cir. 1974); *Duke* v. *North Texas State University,* 469 F.2d 829 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973).*

Finally, petitioner invokes the First Amendment in claiming that the Court of Appeals' statement concerning her criticism of Columbia was an encroachment by the state on her right of free speech. Such a contention is no more logical than it is relevant.

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* It should be noted, however, that even if the Court of Appeals had, in fact, exempted institutions of higher learning from the scope of the Human Rights Law in interpreting that statute, there would be no federal constitutional infirmity as a result thereof as it would be within the power of the New York State Legislature to do so. As petitioner herself acknowledges, such institutions were exempted from the Human Rights Law prior to 1965 and from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, prior to 1972.

POINT III

Petitioner Was Untimely in Raising Her Federal Questions.

Even assuming, *arguendo,* that federal questions have been raised in the instant petition for a writ of certiorari, it must be denied because such questions were not raised at the proper time in the state proceedings. This Court in *Godchaux Co.* v. *Estopinal,* 251 U.S. 179, 181 (1919), has said:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

In the case at bar the first mention of any of the purported federal questions now raised came in the motion for rehearing before the Court of Appeals, that motion being denied without opinion, and many of them were not even raised at that juncture. As this Court held in *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969):

> "It was very clearly established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions,
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> • • •
>
> "Questions not raised below are those in which the record is very likely to be inadequate, since it certainly was not compiled with these questions in mind. And

> in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." *Id.* at 438-439

Only if the highest state court actually considers and disposes of a question not presented at a lower level can Supreme Court review be obtained. *Bailey* v. *Anderson,* 326 U.S. 203, 207 (1945). Raising a federal question for the first time in a petition for rehearing addressed to the highest state court—as petitioner has vaguely done here with respect to only some of the purported constitutional claims now asserted—is insufficient unless that court actually entertained the petition and expressly decided the question. *Hanson* v. *Denckla,* 357 U.S. 235, 243-4 (1958); *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 163-4 (1932); *Forbes* v. *State Council of Virginia,* 216 U.S. 396, 399 (1910). A mere statement by the court denying the petition for rehearing is not sufficient to constitute a reviewable judgment. *Forbes* v. *State Council of Virginia, supra* at 399; *McCorquodale* v. *Texas,* 211 U.S. 432, 436-7 (1908); *Consolidated Turnpike Co.* v. *Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-4 (1913).*

Additionally, this Court may not review a state court determination if the litigant does not follow state procedures in raising the federal questions. *Beck* v. *Washington,* 369 U.S. 541, 550 (1961); *In re Lamkin,* 355 U.S. 59 (1957);

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* In any case, since the Court of Appeals did not consider any federal questions herein, they may not be considered to have been properly raised. *Cf. Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934); *Live Oak Water Users' Association* v. *Railroad Commission of California,* 269 U.S. 354, 357-8 (1925).

Stembridge v. *Georgia*, 343 U.S. 541, 547 (1952); *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-3 (1936). New York law is clear that constitutional questions may not be raised for the first time at the appellate level. *Nathan* v. *Equitable Trust Co.*, 250 N.Y. 250, 165 N.E. 282, *reargument denied*, 250 N.Y. 612, 166 N.E. 344 (1929).

Accordingly, this Court should not review the purported federal questions now raised in the instant position.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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